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NOTE AND COMMENT.

THE LAW SCHOOL.—The Law School reopens this fall with an attendance slightly larger than that of last fall. There are but few changes in the faculty: Professor Bradley M. Thompson, who was a member of the first graduating class of the Law School, and who since 1887 has been Jay Professor of Law, resigned at the end of the last college year, and the resulting vacancy in the faculty has been filled by the appointment of Mr. Edgar N. Durfee as Assistant Professor. Mr. Durfee is a graduate of Harvard College, was for one year a student in this Law School, and later graduated from the University of Chicago Law School; after engaging for two and a half years in the practice of law in Detroit, he went to the Law School of the University of Idaho as Associate Professor, where he spent one year before coming to Ann Arbor this fall. Professor Brewster is absent on leave for another year, but will return next fall to resume his work.

PLEADING ESTOPPEL.—The conflict of opinion on the question as to whether it is necessary to plead facts constituting an estoppel *in pais* still continues, if we are to judge from two cases, *John V. Schaefer, Jr. & Co.* v. *Ely et al.*

(Conn. 1911) 80 Atl. 775, and *Krieg et al.* v. *Palmer National Bank* (Ind. App. 1911) 95 N. E. 613, decided during the summer just past. In the *Schaefer* case, which involved a suit by a contractor to recover the balance due on a contract for erecting a school building, the Supreme Court of Connecticut, on an appeal by the defendants from a judgment for plaintiff on the ground that the lower court had incorrectly sustained a demurrer to that portion of the defendants' answer which attempted to set up an estoppel *in pais* against the plaintiff, decided that the error was harmless, as an estoppel *in pais,* to be proven as a defense, did not need to be pleaded.

This decision is in accord with several other more or less recent cases decided by the Connecticut court on this point. *Buffalo Forge Company* v. *Mutual Security Co.* (1910), 83 Conn. 393, 76 Atl. 995; *Bernhard* v. *Rochester Insurance Company* (1906), 79 Conn. 388, 65 Atl. 134; *Fish, Receiver,* v. *Smith* (1900), 73 Conn. 377, 387, 47 Atl. 711; *Plumb* v. *Curtis* (1895), 66 Conn. 154, 173, 33 Atl. 998; *Hawley* v. *Middlebrook* (1850), 28 Conn. 527. These cases are based largely on the authority of the *Hawley* case, which was decided before the adoption of the code and while Connecticut was still a common law state, and at least one recent Connecticut case has taken a contrary view of the question and required matters of estoppel to be pleaded if they are to be availed of as a defense. *Wilmot* v. *McPadden* (1905), 78 Conn. 276, 61 Atl. 1069. The writer believes the court makes a mistake in following, as an authority in a matter of pleading, the decisions of the court rendered before the adoption of the code and while the procedure was that generally known as "common law." The pleader in courts of law under the old system made considerable use of fictions and many defenses were allowed to be introduced under the general issue of which the plea itself gave no real notice. The intent of the framers of the code was to abolish fictions and to require the facts constituting the cause of action or defense to be pleaded in such a way as clearly to define the issue and give notice to the respective parties of the matters they would be required to meet. This purpose does not seem to be accomplished by allowing a matter of estoppel to be proven without first having been pleaded. The pleadings under the code system more nearly resemble the pleadings in a court of equity than those of a court of law under the old system. And in those states still making use of the common law system of pleading it is quite generally held that it is necessary to plead estoppel *in pais* in a court of equity in order to prove the same. See 9 MICH. L. REV. 497, 498. If the courts in code states go to cases decided under common law procedure for authority on the necessity of pleading estoppel, they should refer to equity, rather than law, cases, and this is especially so since the rule in equity pleading, that every fact essential to the plaintiff's title to maintain the bill and obtain the relief asked must be stated therein and that all matters relied on as a defense must be stated in the answer in order to be availed of for that purpose, is very similar to those provisions of the code which require the complaint to contain "a plain and concise statement of the facts, constituting each cause of action" and the answer to contain "a statement of any new matter constituting a defense."

The position of the Connecticut court and of the New York courts, which

also have generally held that the defense of estoppel *in pais* need not be pleaded to be proved, is illogical and opposed to the spirit of the code. In the *Krieg* case (the recent Indiana case cited above) the court took the more logical position, and, following the uniform holdings of the Indiana courts, decided that the defendant in order to prove an estoppel *in pais* must have pleaded it in his answer. This rule is supported by the great weight of authority and, it is believed, is of universal application in the code states excepting New York and Connecticut. *Dollar* v. *International Banking Co.* (1910), 13 Cal. App. 331, 109 Pac. 499; *Moots* v. *Cope* (1910), 147 Mo. App. 76, 126 S. W. 184; *Fletcher* v. *Painter* (1909), 81 Kan. 195, 105 Pac. 500; *Union Biscuit Co.* v. *Springfield Grocer Co.* (1910), 143 Mo. App. 300, 126 S. W. 996; *Smith* v. *Cleaver* (S. Dak. 1910) 126 N. W. 589; also cases cited in article on *"Pleading Estoppel"* in 9 MICH. L. REV., on pages 577 and 578. G. S.

LIBELS ON PERSON AND ON PROPERTY.—The recent decision in *Cleveland Leader Printing Co.* v. *Nethersole* (Ohio 1911) 95 N. E. 735, promises to invoke discussion among lawyers as well as condemnation from the ranks of the dramatic profession. Suit was brought by an actress of prominence for a libel written by the dramatic editor of the defendant newspaper. After reviewing the ideas of Dr. Torrey, the evangelist, who had recently expressed his opinion of the evils of the stage, the writer said, "We can pass over without much comment his remarks on the unwholesome atmosphere of the stage and its pernicious effects on the youthful mind. All it needs is the qualification 'sometimes.' One of these times was last week, when the whole Nethersolian repertory failed to provide a helpful situation or one that was not tarred with suggestiveness. All the plays left nasty tastes in the memory. As I recall them, 'The Labyrinth' was the worst of the lot. Cleveland received it frigidly, as is the American way when displeased or disgusted, *but when it was produced in London it was hissed so soundly that Miss Nethersole had hysterics.*"

Both of these last statements were false. Without proof of special damage, the plaintiff recovered a judgment of $2,500 in the trial court, affirmed on error in the circuit court. Judgment was reversed by the Supreme Court, which held, as a matter of law, that neither statement was libelous *per se,* even though untrue; for "to say that a woman had hysterics does not bring her into ridicule, hatred, or contempt, nor affect her in her trade and profession," and a statement in a newspaper that "a play owned by such woman had been hissed, is prejudicial to property and not to the person." Furthermore the court declares that in commenting upon matters of public interest, the editor of a newspaper acts under a certain privilege.

For the good of the public, the courts have always given great freedom of expression to critics of authors. *Carr* v. *Hood,* 1 Camp. 355; of artists, *Thompson* v. *Shackell,* 1 Moody & Malkin 187, 31 R. R. 728, which held it not actionable *per se* to call a painting a "daub"; and of actors, *McQuire* v. *Western Morning News Co.* [1903] 2 K. B. 100. But even critics must be fair. When comment becomes malevolent, or exceeds the bounds of fair opinion it has been considered libel since the day of *Dibden* v. *Swan* (1793), 1 Esp.